Supreme Court, U.S.
FILED
JAN 9 1998
CLERK

(6)

No. 97-371

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1997

NATIONAL ENDOWMENT FOR THE ARTS
Petitioner,

v.

KAREN FINLEY, JOHN SLECK, HOLLY HUGHES, TIM MILLER, NATIONAL ASSOCIATION OF ARTISTS' ORGANIZATION
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE NATIONAL FAMILY LEGAL FOUNDATION IN SUPPORT OF THE UNITED STATES

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CONSENT OF PARTIES

Attorneys for Petitioner and Respondents have consented to the filing of an amicus curiae brief by National Family Legal Foundation. (Appendix A).

INTEREST OF THE AMICUS CURIAE

National Family Legal Foundation is a nonprofit, public interest corporation that seeks to preserve the integrity and the innocence of children by promoting a healthy and safe environment, free from pornography and the sexual crimes which invariably accompany its widespread availability. NFLF provides legal assistance to

individuals, organizations, prosecutors and other public officials concerned about the harmful impact of pornography on the quality of life.

NFLF's first executive director, Alan E. Sears, was the Executive Director of the Attorney General's Commission on Pornography. In its 1986 Final Report, the Commission discussed the harms caused by the proliferation of sexual images in our society and warned against the dangers of exposing children and unconsenting adults to pornography. Former Attorney General Edwin Meese III, who presented the 1986 Commission report, continues to support enforcing constitutional laws restricting various forms of pornography by serving as an active member of the Board of Directors for amicus National Family Legal Foundation.

NFLF believes that even non-obscene pornographic images have a negative impact on society, and that taxpayer money should not pay for such indecent material or performances. Further, NFLF believes "indecent" speech has lower constitutional protection than other types of speech, and a

limit on taxpayer funding of indecent performances or material is a legitimate and constitutional governmental regulation. NFLF represented these views in an amicus curiae brief accepted and considered by the United States Court of Appeals for the Ninth Circuit in this case.

SUMMARY OF THE ARGUMENT

The Ninth Circuit decision to invalidate the decency provision of 20 U.S.C. 954(d) (1990)[1] paints First Amendment law with a very broad brush, indeed. *Finley v. National Endowment for the Arts*, 100 F.3d 671 (9th Cir. 1996), *reh. den.* No. 92560280 (9th Cir. May 1, 1997). Ignoring the finer details of the law and pontificating on the dangers of content-based legislation, the court entirely fails to establish that any speech is actually being suppressed by the decency provision. Suppression is the touchstone of a First Amendment claim.[2] It simply does not exist in this case.

The Ninth Circuit's tortuous attempt to find a valid First Amendment liberty interest on which to base a vagueness claim is a thinly veiled attack on morality-based

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[1] "No payment shall be made under this section except upon application therefor which is submitted to the National Endowment for the Arts in accordance with regulations issued and procedures established by the Chairperson. In establishing such regulations and procedures, the Chairperson shall ensure that-

(1) artistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public . . . ." 20 U.S.C. 954(d).

legislation. The court holds that the decency clause is vague, and at the same time ignores the glaringly obvious vagueness of the rest of the statutory scheme.[3] What drives the decision is not legal scholarship, but opposition to religion and morality in the public sphere. The Ninth Circuit has converted the First Amendment from its original purpose of providing a shield to protect the individual from state oppression into a sword used to remove morality from democratically enacted legislation.

This Court has long recognized the legitimacy of the governmental interest in protecting public morals. The protection of societal order and morality justifies the suppression of obscenity. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); *Roth v. United States*, 354 U.S. 476 (1957); *Miller v. California*, 413 U.S. 15 (1973). The state interest in protecting public morality is a valid basis for time, place

[2] "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. Const. Amend. I (emphasis added).

[3] Of course the statutory criteria are vague. . . . 'Artistic excellence' and 'artistic merit' are also vague, and could not be proper criteria for censorship or discrimination in an entitlement program." *Finley*, 100 F.3d at 688 (Kleinfeld, J., dissenting).

and manner regulations on speech. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991) (plurality opinion); *California v. LaRue*, 409 U.S. 109 (1972); *44 Liquormart, Inc. v. Rhode Island*, 116 S.Ct. 1495 (1996); *Federal Communications Commission v. Pacifica Foundation*, 438 U.S. 726 (1978). Furthermore, since indecent and offensive speech does little to further the exalted political and social purposes of the First Amendment, it should be afforded less protection than other forms of speech. *Young v. American Mini Theatres, Inc.*, 427 U.S. 50. (1976); *Renton, supra; 44 Liquormart, supra.* Because the American people, through their elected representatives, are entitled to define the limits of a program for which taxpayer funds have been appropriated, *Rust v. Sullivan*, 500 U.S. 173 (1991), there is no constitutional infirmity in refusing to pay for art that may contribute to the moral decline in America.[4]

[4] We assume for the purpose of our argument, without conceding the point, that the decency provision prohibits the funding of art that offends the standards of decency of a majority of the American public.

ARGUMENT

I. THE GOVERNMENT'S SUBSTANTIAL INTEREST IN THE PRESERVATION OF SOCIETY'S MORALS IS ADEQUATE TO SUPPORT THE DECENCY PROVISION

A. Since the decency clause does not impose an unconstitutional condition on the receipt of a government benefit and since government funding of the arts is not a public forum, the decency clause does not violate the First Amendment.

The First Amendment is violated when the government "abridges" freedom of speech. There are many contexts in which the government can suppress speech without imposing an outright ban. In the area of funding, the general rule is that "[W]hen the government appropriates public funds to establish a program it is entitled to define the limits of that program." *Rust*, 500 U.S. at 194 (upholding government regulations limiting the ability of Tile X fund recipients to engage in abortion-related activity or to endorse abortion as a means of birth control); *Regan v. Taxation With Representation of Washington*, 461 U.S. 540 (1983)

(upholding tax exemption for nonprofit entities that do not engage in lobbying).

There are two exceptions to this rule. The First Amendment is violated when government places an unconstitutional condition on the receipt of a government benefit. *Federal Communications Commission v. League of Women Voters of California*, 468 U.S. 364 (1984) (invalidating a federal law providing that noncommercial television and radio stations that receive federal grants may not engage in editorializing, even if the editorializing is funded by private monies). An unconstitutional condition does not exist if the recipient is free to engage in protected activity outside the scope of the government program. See *Rust*, 500 U.S. at 196-99. Since artists are free to create indecent art with private funds, no unconstitutional condition exists and

the artists' free speech has not been abridged.[5]

A second exception to the general rule that government can define the limits of its programs is when a limited public forum is created by the funding. A limited public forum exists when the government makes money generally available to encourage a diversity of views from private speakers. See *Rosenberger v. Rector and Visitors of University of Virginia*, 115 S.Ct. 2510 (1995) (invalidating university regulation which paid expenses for virtually all student groups except those with a religious viewpoint). Because the National Endowment for the Arts ("NEA") does not give money to all artists who apply, but rather subsidizes select artists to speak certain messages, a limited public forum

[5] The Ninth Circuit's assertion that *Rust* and *Regan* are inapplicable because they did not involve vagueness challenges is a *non sequitur*. *Finley*, 100 F.3d at 679, n. 17. Where, as in this case, there is no possibility of chilling First Amendment speech and the only potential danger is the loss of a prize, a vagueness challenge, whether grounded in the First or Fifth Amendments, is inapposite.

does not exist.[6] Therefore, the general rule for funding of speech applies. Congress can make the value judgment that indecent and offensive art is of slight benefit to society and may even be harmful, and can place indecent art outside the scope of the NEA funding program. If the government can prohibit indecent speech in certain contexts, see *Pacifica*, it certainly can refuse to pay for it.

B. The preservation of morals has long been considered to be within the legislative power of government and is a substantial basis on which to deny an NEA grant.

Since the decency clause does not suppress indecent art, one can only conclude that the Ninth Circuit's opinion is based, not on a concern for liberty, but on animus toward moral judgments in legislation.[7] However, this Court has

[6] The various content-based distinctions in 20 U.S.C. § 954(c) and (d) indicate Congress intended to use artists to convey certain messages rather than pay artists to say what they wanted.

[7] "Thus, we routinely consider whether speech-related statutes are impermissibly vague without specifying the liberty or property interest at stake." *Finley*, 100 F.3d at 675, n.4.

never held that moral distinctions in legislation are oppressive *per se*, whether or not the effect of the legislation is to restrict individual liberty. And this Court has never considered moral judgments in law to be incompatible with a free society. In fact, this Court has long recognized the government's substantial interest in promoting morality and on this basis has upheld many speech-related restrictions ranging from total suppression to time, place and manner regulation on this basis.

In *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), the Court upheld a state law prohibiting the uttering of "offensive, derisive or annoying word[s]" to anyone "with intent to deride, offend or annoy him". *Chaplinsky*, 315 U.S. at 569. In so doing, the Court stated, "it has been well observed that such utterances [lewd, obscene, profane, libelous, insulting speech] are no essential part of any exposition of ideas, and are of such slight social value as a step to truth than any benefit that may be derived from them is clearly outweighed by the social interest in order and

morality." *Chaplinsky*, 315 U.S. at 572 (emphasis added). The Court reasoned that society's interest in order and morality was a sufficient basis for upholding a statute that suppressed speech which was likely to result in a breach of the peace.

Following the reasoning of *Chaplinsky*, the Court in *Roth v. United States*, 354 U.S. 476 (1957), held that obscenity is not constitutionally protected speech:

> The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people . . . . 'The last right we shall mention, regards the freedom of the press. The importance of this consists, besides the advancement of truth, science, morality, and arts in general, in its diffusion of thoughts between subjects . . . . . But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. This rejection for that reason is mirrored in the universal judgment that obscenity should be restrained . . . . This is the same judgment expressed by this court in *Chaplinsky v. New Hampshire* . . . ."

Roth, 354 U.S. at 484-85 (emphasis added).

This same reliance on a concern for public morality formed the basis for the obscenity tests enunciated in *Memoirs v. Massachusetts*, 383 U.S. 413 (1966) and *Miller v. California*, 413 U.S. 15 (1973). The second prong of the *Memoirs* test required that the material in question be "patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters." *Memoirs*, 383 U.S. 418 (emphasis added). Similarly, the first two prongs of the *Miller* test – whether the average person would find that the work appeals to the prurient interest in sex and whether the work depicts or describes sexual conduct in a patently offensive way – are determined with reference to contemporary community standards. *Miller*, 413 U.S. at 14; *Smith v. United States*, 431 U.S. 291 (1977). Therefore, unlike the Ninth Circuit, the Supreme Court has never held that morality concerns cannot be used to justify restrictions on speech. In fact, a concern for the preservation of morality forms the basis for suppressing obscene speech.

Nor can it be claimed that the preservation of morality is an impermissible basis for any lesser restriction on speech that is protected by the First Amendment. In *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), this Court upheld a state indecency statute which placed an incidental limitation on the purportedly expressive activity of nude dancing. "The traditional police power of the States is defined as the authority to provide for the public health, safety, and morals, and we have upheld such a basis for legislation." *Barnes*, 501 U.S., at 569 (plurality opinion). "Our society prohibits, and all human societies have prohibited, certain activities not because they harm others but because they are considered . . . immoral. . . . [T]he Constitution does not prohibit [certain types of legislation] simply because they regulate 'morality'". *Barnes*, 501 U.S. at 575 (Opinion of Scalia, J., concurring).

In *California v. LaRue*, 409 U.S. 109 (1972), this Court upheld California Department of Alcoholic Beverages Control regulations which prohibited nudity and the performance of sex acts in establishments licensed to sell

liquor, while noting that some of the activities proscribed were protected by the First Amendment. *LaRue*, 409 U.S. at 118-19. The Court acknowledged that police power to protect the public health, welfare and morals, but based its decision instead on the Twenty-first Amendment. *LaRue*, 409 U.S. at 114.

In *44 Liquormart, Inc. v. Rhode Island*, 116 S.Ct. 1495 (1996), this Court affirmed the holding of *LaRue*, but disavowed its reliance on the Twenty-first Amendment, relying instead on the state's police power to regulate expressive conduct: "[T]he Court has recognized that the State's inherent police powers provide ample authority to restrict the kind of "bacchanalian revelries" described in the *LaRue* opinion regardless of whether alcoholic beverages are involved." *44 Liquormart*, 116 S.Ct. at 1514.

Finally in *Federal Communications Commission v. Pacifica Foundation, supra*, this Court upheld the FCC's authority to impose sanctions on licensees who engage in indecent broadcasting. In so doing, three of the Justices

reasoned that "These words offend for the same reasons that obscenity offends. . . . '[A]ny benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'" *Pacifica*, 438 U.S. at 746 (quoting *Chaplinsky, supra*). Regardless of whether it is appropriate to apply the definition of "indecency" articulated in *Pacifica* to the arts,[8] this Court recognized the government's concern for morality and upheld the FCC's power to impose sanctions on speakers who violated its decency standard.

While the Ninth Circuit opinion implicitly holds that the concern for public morality and speech-related legislation are mutually exclusive under the First Amendment, the previous cases clearly indicate that a concern for the preservation of public morality is not inconsistent with free speech rights and, indeed, is one of

[8] See *Finley*, 100 F.3d at 679, n. 15.

the purposes of the First Amendment. See *Roth*, 354 U.S. at 484-85. Contrary to the Ninth Circuit's thinking, the true inconsistency lies in a view of the First Amendment which would permit the suppression and regulation of offensive speech in order to uphold morality, while disallowing a legislative decision to refuse to promote speech that "offend[s] for the same reasons that obscenity offends." *Pacifica*, 438 U.S. at 746. Consistent with this Court's treatment of indecent and offensive speech and its recognition of the government's concern for public morality, this Court should uphold the decency clause in §954(d) as a valid method of keeping government out of the business of promoting immorality.

C. Morality is the bedrock on which a free society maintains its existence.

A present-day concern for public morality is not merely a quaint relic reminding us of a more homogeneous religious past. The Founding Fathers considered morality to be integral to a free and healthy society. George Washington in his

farewell address stated: "Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports."[9] John Adams stated in his speech "Thoughts on Government":

> The dignity and stability of government in all its branches, the morals of the people . . . depend so much upon an upright and skillful administration of justice, that the judicial power ought to be distinct from both the legislative and executive . . . . A constitution founded on these principles . . . causes . . . good morals to be general.

Unfortunately, many in America have relegated to folklore the notion that morality is necessary or even possible in modern society. But the legacy of immorality has produced devastation in our country. According to the Centers for Disease Control, approximately 70 percent of AIDS cases diagnosed through 1996 are attributable to unprotected sexual activity and intravenous drug use.[10] As of 1995, HIV

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[9] James D. Richardson, *A Compilation of the Messages and Papers of the Presidents, 1789-1897* (Published by Authority of Congress, 1899), Vol. 1, p. 220.

[10] Centers for Disease Control and Prevention ("CDC"), *HIV/AIDS Surveillance Report-1996*, Vol. 8 No. 1 June 1996, Table 3, p. 8.

infection was the leading cause of death for males 25-44 years of age.[11]

Moreover, in 1992, approximately 30 percent of 14- and 15- year-old teenagers were sexually active, and almost 20 percent had multiple sex partners. Almost 60 percent of 16- and 17- year-olds were sexually active and almost 40 percent had multiple partners.[12] When one considers the increased levels of sexual activity among young people with the devastation of AIDS and other sexually transmitted diseases, the specter of potential harm is truly frightening.

Not only has the lowering of moral standards resulted in disease and death, but it has locked many into a life of poverty, abuse and behavioral problems. The number of births to unwed mothers under the age of 19 increased from approximately 275,000 in 1985 to approximately 375,000 in 1991; the number of births in the 20-29 age group rose from

[11] CDC, "Report of Final Morality Statistics, 1995", *Monthly Vital Statistics Report*, Vol. 45, No. 11 (S2).

450,000 in 1985 to over 650,000 in 1991.[13] The difficulty of raising children alone has resulted in a disproportionate amount of social problems being associated with single parenting.

According to a growing body of social-scientific evidence, children in families disrupted by divorce and out-of-wedlock birth do worse than children in intact families on several measures of well-being. Children in single-parent families are six times as likely to be poor. They are also likely to stay poor longer. Twenty-two percent of children in one-parent families will experience poverty during childhood for seven years or more, as compared with only 2 percent of children in two-parent families. A 1988 survey by the National Center for Health Statistics found that children in single-parent families are two to three times as likely as children in two-

[12] Adams P.F., Schoenborn C.A., Moss A.J., Warren C.W., Kann L., *Health Risk Behaviors Among Our Nation's Youth*, National Center for Health Statistics. Vital Health Stat 10(192) 1992.
[13] Ventura, S.J., *Births to Unmarried Mothers: United States, 1980-1992.* National Center for Health Statistics Vital Health Stat 21(53) 1995.

parent families to have emotional and behavioral problems. They are also more likely to drop out of high school, to get pregnant as teenagers, to abuse drugs, and to be in trouble with the law. Compared with children in intact families, children from disrupted families are at a much higher risk for physical or sexual abuse.[14]

As these facts indicate, morality is not merely an esoteric notion for philosophers to discuss at their leisure, but rather it has a real impact on the quality of people's lives . . . and deaths. Artists who view themselves as self-appointed prophets of a new morality are not the ones cleaning up the mess created by their libertine philosophies. If mainstream Americans protest the spending of public money on art that challenges conventional mores, it is because those same Americans and their children are paying and will continue to pay the long-term costs. If the right of self-determination

[14] Barbara Dafoe Whitehead, "Dan Quayle Was Right", in *Atlantic Monthly*, April 1993.

does not include the right to refuse to allocate money to support speech reasonably associated with suffering and untimely deaths, then such a right is not very significant.

II. INDECENCY HAS LESS FIRST AMENDMENT VALUE THAN POLITICAL AND SOCIAL SPEECH AND THEREFORE IS SUBJECT TO DIFFERENT TREATMENT IN CERTAIN CONTEXTS.

Because indecency "offend[s] for the same reasons that obscenity offends"[15] it should be accorded less constitutional protection than political or social speech.

In *Pacifica*, a plurality of this Court stated with reference to indecent speech:

> T]he constitutional protection accorded to a communication containing such patently offensive sexual and excretory language need not be the same in every context. It is characteristic of speech such as this that both its capacity to offend and its "social value" . . . vary with the circumstances.

Id., at 747.

[15] *Pacifica*, 438 U.S. at 746.

In that case, the Supreme Court ruled the FCC could regulate the time when "obscene, indecent, or profane language" was broadcast, pursuant to 18 U.S.C. § 1464:

> If there were any reason to believe that the Commission's characterization of the Carlin monologue as offensive could be traced to its political content – or even to the fact that it satirized contemporary attitudes about four-letter words – First Amendment protection might be required. But that is simply not the case. These words offend for the same reasons that obscenity offends.

Pacifica, at 746.

The monologue in question, though not legally obscene, used a variety of words describing excretory and sexual organs and activities, the exposure of which by verbal or physical acts the Court considered "offensive irrespective of any message that may accompany the exposure." *Pacifica*, at 746, n. 23 (emphasis added). Some of the artists' work in this case is characterized by similarly offensive speech or conduct. The fact that indecency may be classified as art does not save it from being categorized as low-level speech, just as

the possible political or satirical nature of the Carlin monologue did not afford it full First Amendment protection, the possible artistic nature of the material in *Young* did not exempt it from time, place and manner regulation, and labeling the conduct in *Barnes* as "dance" did not protect it from a state's prohibition of public nudity. That which the government can entirely prohibit in certain contexts, it must not be required to pay for.

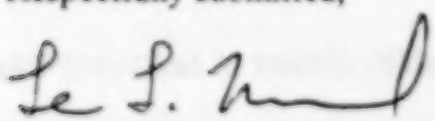
CONCLUSION

In summary, the First Amendment does not condemn American people to the unenviable position of endorsing what they cannot tolerate, for any art funded by the NEA necessarily bears the imprimatur of the American public. Principles of self-autonomy and of democratic government trump any imagined liberty interest at stake. The artists are not stripped of their freedom to create offensive art by the decency clause. The American people are entitled to exercise their freedom to use public funds in a manner consistent with

their standards and values. To those who smear chocolate on their private parts in public, the American taxpayer is entitled to say, "Don't quit your day job, because we're not paying for this anymore."

For all the foregoing reasons, amicus curiae National Family Legal Foundation respectfully requests that this court reverse the decision of the U.S. Court of Appeals for the Ninth Circuit, and uphold the constitutionality of the decency provision of 20 U.S.C. § 954(d).

Respectfully submitted,



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Counsel of Record for amicus curiae

Sheila Green

APPENDIX A

U. S. Department of Justice

Office of the Solicitor General

Washington, D.C. 20530

RECEIVED
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December 29, 1997

Sheila A. Green
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Re: National Endowment for the Arts v. Finley, No. 97-371

Dear Ms. Green:

As requested in your letter of December 23, 1997, I hereby consent to the filing of an amicus curiae brief by the National Family Legal Foundation in the above-captioned case.

Sincerely,

Seth P. Waxman

Seth P. Waxman
Solicitor General

cc: William K. Suter, Esq.
Clerk
Supreme Court of the United States
Washington, D.C. 20543

I HEREBY CONSENT to the filing of an amicus curiae brief by National Family Legal Foundation in support of the position of the appellant in the case National Endowment for the Arts v. Finley, Docket No. 97-371

DATE 12/29/97 _____
Attorney of Record for Appellee
Respondents: Karen Finley, et al.

TOTAL P.002

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing "Brief of Amicus Curiae National Family Legal Foundation In Support of the United States" have been sent by Federal Express for overnight delivery prior to 3:00 p.m. on Friday, January 9, on this 8th day of January, 1998 to the following:

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